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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY MANGES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0504-CR-181
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0012-CF-186

JANUARY 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Timothy Manges ("Manges") brings this direct appeal from his conviction by a jury of the Class A felony of child molesting.

We affirm.

ISSUES

We quote Manges statement of the issues:

A. Was Manges denied Due Process of Law when counsel for the State concealed from the jury that the State had threatened State's witnesses with prosecution?

B. Was Manges denied Due Process of Law when counsel for the State intentionally solicited false and misleading testimony from State's witness?

C. Was Manges denied Due Process of Law by means of a fair trial when the State repeatedly made improper and prejudicial statements during voir dire and trial?

D. Was Manges denied Due Process of Law when the State proceeded vindictively in prosecution for retaliation against Manges proceeding pro se?

E. Was Manges denied Due Process of Law by means of a fair trial before an impartial judge when the trial judge exhibited partiality to the State?

F. Was Manges denied Due Process of Law by the trials (sic) court's limiting Manges cross-examination of state's witnesses?

G. Was Manges denied Due Process of Law and his right to notice of the nature and causes of the charges against him when the State failed to allege an essential element of I.C. 35-42-4-3(a) in its Charging Information?

H. Was Manges denied Due Process of Law by the failure to record his custodial interview?

I. Is the current standard that a defendant must show "bad faith" on the part of law enforcement officials in their failure to record a custodial interrogation sufficient to protect a defendant's right to Due Process of Law?

J. Was Manges denied his right to have his jury determine aggravators and mitigators used by the court at sentencing?

FACTS

A.M. was Joy Manges' oldest child, who was born on July 22, 1987. Joy and Timothy Manges were married in 1994 and had two children, M.M. and T.M. They were divorced in 2000 with one of the reasons being that Manges and A.M. did not get along. During the marriage, Joy saw Manges doing what she thought were inappropriate things with A.M., such as taking baths with her and lying in bed with her while naked. Joy told Manges on numerous occasions to stop these activities. Joy also wondered if Manges had touched A.M., but she thought he was not capable of it. After the divorce, Joy lived in Goshen and maintained a friendly relationship with Manges.

Manges contacted Joy about spending the night at her house in order to see his children perform at a church program the next morning, and then take them on visitation. Manges' request to spend the night was not unusual. After arriving, Manges watched a movie with Joy and A.M. in Joy's bedroom. When the movie was over Manges was to spend the night in his children's bedroom. Joy went to sleep watching the movie. After the movie was over, A.M. was not feeling well and went to bed in her bedroom. Manges gave her Tylenol for her headache. Manges then pulled A.M. off the bed and rubbed his penis against her. Joy by then had awakened and noticed that Manges and A.M. were not there. Joy went to check on A.M. and found her in her bedroom with the lights turned off. Joy turned the lights on and saw A.M. bending over the bed with her feet on the floor and Manges standing right behind her. Manges pushed A.M. onto the bed and

quickly set down in a chair. Joy told Manges to stand up. At first he refused, but then did stand up. His penis was partially erect. Manges left the room, and Joy spoke with A.M. who was defensive. Joy then spoke with Manges. He admitted that over a period of a couple of years he had been rubbing A.M., and that he had touched her breast and vagina.

Joy contacted the police. A.M. told them that in 1999 Manges had put his mouth on her vagina. Detective Mackowiak took Manges' statement after giving him the Miranda warning. Manges said he had been touching A.M. in an inappropriate manner for a year and a half, that he had performed oral sex on her, and he had placed his finger in her vagina.

Manges acted as his own attorney before, during, and after the trial.

Additional facts will be added as needed.

DISCUSSION AND DECISION

Initially, we observe that Manges does not dispute that the evidence is sufficient to sustain the verdict. However, we observe that subsumed into his argument on a number of his issues is the apparent belief that the court on appeal will weigh the evidence and determine the credibility of the witnesses. This we will not do. See Morrison v. State, 824 N.E.2d 734, 742 (Ind. Ct. App. 2005).

Issues A and B.

Manges argues these two issues relating to alleged prosecutorial misconduct together. Initially, we note that Ind. Appellate Rule 46(A)(8)(b) requires that an appellant's brief "must include for each issue a concise statement of the applicable

standard of review." Jackson v. State, 758 N.E.2d 1030, 1037 (Ind. Ct. App. 2001). This failure to cite the appropriate authority constitutes waiver of this argument. Id. Furthermore, a defendant waives appellate review of the issue of prosecutorial misconduct when he fails to immediately object, request an admonishment, and then move for a mistrial. Reynolds v. State, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003). A timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement. Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003). Manges failed to do this.

A contemporaneous objection is generally required to preserve an issue on appeal. White v. State, 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006). The purpose of such a rule is to promote a fair trial by precluding a party from sitting idly by and appearing to assent to a ruling by the court only to cry foul when the outcome goes against him. Rembusch v. State, 836 N.E.2d 979, 983 (Ind. Ct. App. 2005). Manges does not argue in his brief that these alleged errors constitute fundamental error. Also, a party may not invite error, and then later argue that the error supports reversal, because error invited by the complaining party is not reversible error. Gamble v. State, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005).

Additionally, Manges either starts or concludes several of his arguments with the general assertion that he was denied his constitutional right to a fair trial in a variety of ways. Although he cites U.S. Constitutional amendments, he provides no cogent argument as to how these rights were violated and has thus also waived these claims under App. Rule 46(A)(8). Majors v. State, 773 N.E.2d 231, 235 n.2 (Ind. 2002).

Issue C.

When arrested a criminal defendant has a right to remain silent and must be advised of that right. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). If a defendant, after receiving the Miranda warning, chooses to exercise that right, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). While a defendant is guaranteed the right not to have his silence used against him, when a defendant does not remain silent, he cannot later claim that the silence was used against him. Sylvester v. State, 698 N.E.2d 1126, 1130-31 citing Allen v. State, 686 N.E.2d 760 (Ind. 1997).

In the present case, Manges confessed to police officers after receiving his Miranda warning. Therefore, he has not remained silent and cannot claim a Doyle violation. See: Sylvester, 698 N.E.2d at 1131.

Furthermore, in Taylor v. State, 677 N.E.2d 56, 60 (Ind. Ct. App. 1997), the defendant challenged the prosecutor's comments during closing arguments that the evidence in that case was "uncontroverted." That defendant's attorney objected and requested a mistrial. Both requests were denied by the trial judge. On appeal, a panel of this court held that the Fifth Amendment privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence. Id. However, our supreme court has held that if in its totality, the prosecutor's

comment is addressed to other evidence rather than the defendant's failure to testify, it is not grounds for reversal. Id. citing Channell v. State, 658 N.E.2d 925, 932 (Ind. Ct. App. 1995), *trans. denied.*

Comment on the lack of evidence by the defense concerning otherwise incriminating evidence against him is proper as long as the State focuses on the absence of any evidence to contradict the State's evidence and not on the accused's failure to testify. Channell, 658 N.E.2d at 932. In the present case, Manges stated in his closing argument that there was reasonable doubt about his guilt. In response on rebuttal, the State argued that there was no reasonable doubt regarding Manges' guilt because of the uncontroverted nature of the State's evidence. As in the cases discussed above, we conclude that there is no Doyle violation here.

Manges divides his argument under this issue into a number of sub-issues. One of these is that the State improperly commented on the burden of proof and the presumption of innocence during *voir dire* and closing argument. We are not directed to any contemporaneous objection or other curative action taken by Manges to preserve this issue for appeal. We would also observe that Manges makes a general argument saying that his federal and state constitutional rights were violated. However, the argument that follows is based on speculation and conjecture and does not constitute the cogent argument required by App. Rule 46(A)(8). See: Majors, 773 N.E.2d at 235 n.2.

Manges alleges that the State improperly vouched for the credibility of the State's witnesses. Again, waiver prevails because of the lack of a contemporaneous objection or other curative action at trial, and Manges' failure to allege that the error is fundamental.

The foregoing also applies to Manges' contention that the State improperly vouched for the State's case, evidence, and the State itself. It should be noted that this court will not become a party's advocate, nor will we address arguments that are inappropriate, improperly expressed, or too poorly developed to be understood. Barrett v. State, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005).

Issue D.

Manges next argues that the State acted vindictively because he proceeded *pro se*. This argument apparently arises when the State, prior to Manges firing his attorney, offered a plea agreement allowing Manges to plead to a lesser felony. The State withdrew the offer after Manges fired his appointed counsel and proceeded *pro se*. A criminal defendant has no constitutional right to engage in plea bargaining. Roeder v. State, 696 N.E.2d 62, 64 (Ind. Ct. App. 1998). A prosecutor is under no duty to plea bargain at all, or to keep an offer open, as the offer remains in the discretion of the prosecutor. Id. A prosecutor has the absolute authority to withdraw a plea agreement before it has been reduced to writing and submitted to the court. Id.

We view Manges' argument for naught because what the prosecutor did was proper.[1]

We also note that the trial court on at least two occasions advised Manges of his responsibilities in representing himself. Manges was told that his doing so was ill

[1] . Manges appears inconsistent because of the vindictive nature of this issue and then Manges prefaced a pre-trial motion with "Comes now the accused, an individual in the exercise of accountability, untrained in the law, unfamiliar with the local rules, asking that his pleadings be liberally construed, and moves this Court….". It appears that on the one hand Manges wants to be protected because he is proceeding *pro se*, and on the other hand claims vindictiveness on the part of the State because he is proceeding *pro se*.

advised. A litigant who chooses to proceed *pro se* will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his action. Shepherd v. Truex, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004). A defendant expressly informing the trial court that he did not wish the assistance of counsel cannot later cry foul because the trial court abided by his wishes. Curry v. State, 643 N.E.2d 963, 982 (Ind. Ct. App. 1994).

Issue E.

Manges alleges that the trial judge was not impartial. The bulk of the argument on this issue stems from Manges concluding statement at the end of his sentencing. Manges alleges that the trial court was partial to counsel for the State: that the trial judge on three occasions aided the State; that the trial judge interrupted Manges cross-examination of a witness; and, the trial judge played solitaire on his lap-top computer. At this point, which was very shortly before the pronouncement of the sentence, Manges orally moved for the trial judge to recuse himself saying that the trial judge was biased, prejudiced, and incompetent because during the trial the judge played solitaire on his computer. The motion was denied.

Ind. Crim. Rule 12(B) sets forth the change of judge procedure in felony cases. It requires, among other things, a timely filed affidavit setting forth the facts and reasons for the belief that such bias exists and shall be accompanied by a certificate that the attorney of record (we assume Manges in this case) in good faith believes that historical facts so recited are true. There was a complete failure of Manges to comply with the rule.

Waiver aside, the law presumes that a judge is unbiased and unprejudiced. Massey v. State, 803 N.E.2d 1133, 1138-39 (Ind. Ct. App. 2006). To rebut that presumption, a defendant must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy. Id. Bias and prejudice exist only where there is an undisputed claim or where the judge expressed an opinion of the controversy over which the judge was presiding. Id. An adverse ruling alone is insufficient to show bias or prejudice and the record must show actual bias and prejudice against the defendant before a conviction will be reversed on the ground that the trial judge should have been disqualified. Id.

Not only was Manges' request for recusal untimely, it also challenges things that occurred during the trial. No contemporaneous objection or other action was taken to any of the supposed biased or prejudicial conduct of the trial judge.

Issue F.

It is next argued that the trial court imposed improper limitations on Manges' ability to cross-examine the State's witnesses.

Manges was cross-examining his former wife about supposed threats by the State to her, as best we can tell, about charging her with criminal activity. The exchange that prompts this issue is:

> PROSECUTOR: Objection, Judge. We're going far afield of direct examination. We're going into issues that are in no way relevant to the issue that we are really here for, to determine whether or not Mr. Manges is guilty of child molestation. Question is immaterial, irrelevant, and outside the scope of direct examination.

> MANGES: The question, your honor, was—is in regards to intimidating—intimidating the witness and prosecutorial misconduct.
> PROSECUTOR: Precisely, Judge, which are issues that are not before this court.
> MANGES: When is prosecutorial misconduct not an issue before the court?
> COURT: Well, now, for one time. The objection is sustained. Proceed.
> Tr. p .301.

Trial judges have wide latitude to impose reasonable limits based on concerns including harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. Wright v. State, 836 N.E.2d 283, 289 (Ind. Ct. App. 2005). Violations of the right to cross-examine are subject to harmless error analysis. *Id.* To determine whether an error is harmless, we look to several factors, including the strength of the prosecution's case, the importance of the witness' testimony, whether the testimony was corroborated, the nature of the cross-examination that did occur, and whether the witness' testimony was repetitive. Id. A trial court's decision to determine the scope of cross-examination as to the appropriate extent of cross-examination will only be reversed for an abuse of discretion. McCorker v. State, 797 N.E.2d 257, 266 (Ind. 2003). To constitute an abuse of discretion, the trial court's decision must be one, which is clearly against the logic and effect of the facts and circumstances before the court. Stone v. State 536 N.E.2d 534, 538 (Ind. Ct. App. 1989). An abuse of discretion is an erroneous conclusion and judgment, one clearly against the logic and effect of the facts or the reasonable, probable deductions to be drawn therefrom. *Id.*

In a preceding issue we have decided that no prosecutorial misconduct occurred in this case. A reading of the transcript reveals that Manges' question goes beyond the

scope of direct examination and is irrelevant to the issues being tried to the jury. The trial court placed reasonable limitations on Manges as they applied to prejudice, confusion, or interrogationas to issues that are marginally relevant. Standifer v. State, 718 N.E. 2d 1107, 1110 (Ind. 1999). There is no abuse of discretion.

Issue G.

Manges posits that he was denied due process of law because the State failed to allege an essential element of the child molesting statute.

Ind. Code §35-42-4-3 defines child molestation, as applicable to this case, as a person who, with a child under fourteen years of age, performs or submits to deviate sexual conduct, commits child molesting. It is a class A felony if committed by a person at least twenty-one years of age.

The charging information reads in pertinent part:

> "…one Timothy Paul Manges, a person over twenty-one years of age, to wit: twenty-three years of age, did then and there cause a female minor child under the age of fourteen years of age, to wit: [A.M.], twelve years of age to submit to deviate sexual conduct, to wit: cunnilingus; all of which is contrary to……." Appellant's App. p. 20.

Manges argues that the charging information fails to allege that he performed cunnilingus on A.M. Instead he argues that he only "caused A.M. to submit to cunnilingus".

Generally, a challenge to the sufficiency of an information must be made by a motion to dismiss prior to arraignment. Dickenson v. State, 835 N.E.2d 542, 549 (Ind. Ct. App. 2005). Failure to assert error in an indictment or information results in waiver of that error. *Id.* Manges skirts waiver by asserting the error is fundamental. To be

considered fundamental, the error here must be so prejudicial to the rights of [Manges] that he could not have received a fair trial. *Id.*

An information that enables an accused, the court, and the jury to determine the crime for which conviction is sought satisfies due process. *Id.* Errors in the information are fatal only if they mislead the defendant or fail to give him notice of the charge filed against him. *Id.* Although the State may choose to do so, it is not required to include detailed factual allegations in the charging instrument. *Id.*

We are of the opinion that the charging information was sufficient. Manges in his statement to the police admitted to the act. We are not shown by Manges that the wording of the charging information deprived him of being misled or failed to give him notice of the charge filed against him.

Issue H.

Next Manges argues he was denied due process of law because of the failure to record his custodial statement. The same issue was raised in the case of Gasper v. State, 833 N.E.2d 1036, 1039-40 (Ind. Ct. App. 2005). See also: Stoker v. State, 692 N.E.2d 1386 (Ind. Ct. App. 1998). This court held that the due course of law provision of our state constitution did not require law enforcement officers to record custodial interrogation in places of detention. Manges' argument notwithstanding, the law is clear that recording custodial statements is encouraged, but not mandatory.

Issue I.

Manges also argues that the "bad faith" [2] requirement that a defendant must show on the part of law enforcement officials is unconstitutional. In large measure this argument is a continuation of the argument made in Issue I. We decline to overrule existing case law and, as before, note that recording is recommended, but not required.

Issue J.

At sentencing the trial court found five aggravating factors: Manges had a prior misdemeanor conviction; the victim was Manges step-child and he violated her trust; Manges abused the victim for a period of eighteen months; Manges abused the victim in numerous different ways; and, Manges violated a no contact order. The mitigating circumstances were that Manges had no prior felony convictions; Manges supported his ex-wife and children; and, that Manges may be amenable to therapeutic intervention. The trial court attached little weight to the two latter mitigating circumstances and found that the aggravating circumstances outweighed the mitigating circumstances. Manges was sentenced to the enhanced maximum of fifty years for a class A felony. See: Ind. Code §35-50-2-4.[3]

Manges says he was denied the right to have a jury determine the aggravators and mitigators used by the trial court at sentencing pursuant to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). Blakely was adopted into Indiana case law in Smylie v. State, 823 N.E.2d 679 (Ind. 2005).

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[2] The "bad faith" that Manges alludes to is exemplified in Jewell v. State, 672 N.E.2d 417, 422 where the court held that the defendant is required to make a substantial showing that a probable cause affidavit was obtained with false statements made knowingly or intentionally, or with reckless disregard for the truth.

[3] . The State reminded the trial judge during the sentencing hearing that the jury was out for eleven minutes before returning a verdict. Sentencing Hearing Tr. p. 60.

For cases in which the appellant's initial brief was filed after the date of the Smylie decision, a specific Blakely claim must be made in the appellant's initial brief on direct appeal for it to be reviewed on the merits. See: Kincaid v. State, 837 N.E.2d 1008, 1010 (Ind. 2005). Manges was charged in December of 2000, found guilty in his jury trial on November 14, 2001, and was sentenced on January 17, 2002. Smylie was decided on March 9, 2005. Manges raised his Blakely claim in his opening brief on direct appeal, which was filed on October 20, 2005. Therefore, we reach the merits of his claim.

The case of Trusley v. State, 829 N.E.2d 923 at 925 (Ind. 2005), in discussing Blakely, says that the trial court may use the defendant's prior criminal history as well as facts which are admitted by the defendant in enhancing a sentence without the intervention of a jury.

Manges voluntarily went to the police station where Detective Mackowiak gave Manges the Miranda warnings and then took his statement. The statement contained a paragraph that says:

> I am aware that I am a suspect in the offense for which I am giving this statement. I have been duly warned by Det. Mackowiak, who has identified himself/herself as a Goshen Police Officer, that I have the right to remain silent. Anything that I say may be used against me in a court of law. I have the right to talk to a lawyer and to have him/her present with me while I am being questioned. If I am indigent or poor and cannot afford to hire a lawyer, one will be appointed to represent me before any questioning, if I wish one. I have been asked if I understand each of these rights I had explained to me and my answer is YES. I have also been asked, having these rights in mind, do I wish to talk to the police now and my answer is YES.

Manges signed the statement. In this statement Manges admitted that he had been touching A.M in a sexually inappropriate manner for a year and a half; that he performed oral sex on her; he had inserted his finger into her vagina; and, that he was A.M.'s stepfather.

When the State moved to admit State's Exhibit 4, the statement referred to above, Manges said "it is not true". The trial judge observed that his statement did not constitute an objection and admitted the exhibit. The trial judge was correct because the grounds for objection must be specific and any grounds not raised in the trial court are not available on appeal. Grace v. State. 731 N.E.2d 442, 444 (Ind. 2000). In order to preserve a claim of trial court error in the admission or exclusion of evidence, it is necessary at trial to state the objection together with the specified ground or grounds therefore at the time the evidence is first offered. *Id.*

Facts that are admitted by the defendant do not require a jury's sanction or approval to be used as aggravating circumstances. White v. State, 846 N.E.2d 1026, 1035 (Ind. Ct. App. 2006). State's Exhibit Four is such an admission by the defendant.

Manges argues that his misdemeanor conviction is not sufficient to sustain the enhanced sentence. The battery conviction, originally charged as a class D felony, was reduced to a misdemeanor. Manges did not file the pre-sentence report so we are not in a position to make a determination of whether or not his allegation is correct, however, a sentence may be enhanced when the criminal history is comprised of misdemeanors. Williams v. State, 830 N.E.2d 107, 113 (Ind. Ct. App. 2005). A single aggravating factor may support the imposition of an enhanced sentence. Cannon v. State, 839 N.E.2d 185,

193 (Ind. Ct. App. 2005). The appellant bears the burden of presenting a record that is complete with respect to the issues raised on appeal. Moffit v. State, 817 N.E.2d 239, 247 (Ind. Ct. App. 2004).

CONCLUSION

None of the several issues raised by Manges present reversible error. Judgment affirmed.

SHARPNACK, J., and MATHIAS, J., concur.